Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970

No. 78

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

PETITION FOR REHEARING

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Dated: December 31, 1970.

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PETITION FOR REHEARING

Appellants Atlantic City Electric Company, Niagara Mohawk Power Corporation, Public Service Electric and Gas Company and Rochester Gas and Electric Corporation hereby respectfully petition this Court for an order vacating its judgment herein and restoring the case to the docket for reargument. The decision below was affirmed by an equally divided Court, Mr. Justice Douglas taking no part in the consideration or decision of the case.

While Mr. Justice Douglas did not participate in two early procedural motions in this case, these appellants were unaware, until commencement of oral argument, that he might not participate in considering or deciding this matter. Had appellants known prior thereto that he would abstain from participation they would have sought to make known to the entire Court, if deemed proper, their belief that his participation would be unobjectionable and desirable in the public interest. Appellants' position is unchanged.

Therefore, these appellants respectfully urge the Court to grant this petition for rehearing; and further respectfully request that Mr. Justice Douglas participate in consideration of this petition, and, if granted, that he participate in the ultimate decision of this case.

The Grant of Rehearing Now is the Most Appropriate Manner in Which to Settle the Question Raised

The question here before the Court is obviously important, as the Court recognized when it decided to take jurisdiction of this appeal. It affects not only every shipper and consumer of railroad-transported commodities in the United States, but also the economic welfare of the nation and of the railroad industry. That question is: Does immunity from judicial review attach to the procedures followed by the Interstate Commerce Commission during an investigatory hearing on a general rail rate increase, and to the final order deciding issues raised therein?

The present state of the law with respect to this question remains unsatisfactory to all concerned, since the Court's affirmance of the decisions below* is not a legal precedent and may not be relied on as controlling in future cases. At the same time it leaves appellants in this case without a remedy. It would seem more equitable for reargument to be heard by the full Court now than for appellants to incur the burden and expense of prosecuting a new complaint proceeding in a District Court, arising out of a later Commission decision.

Subsequent to the general revenue proceeding which is the subject of this case, the Commission has reached a final decision in another general freight rate increase (Ex Parte

* In the companion case to No. 78, *Alabama Power Co., et al.* v. *U.S.A. and I.C.C., et al.* No. 106, there was a strong dissent by Hon. H. Skelly Wright.

262). It also has rendered interim decisions in two later general freight rate increases. A complaint arising out of the increase on which the Commission has reached its final decision (Ex Parte 262) is presently pending in the United States District Court for the Southern District of New York. It is probable and certainly reasonable to suppose that other complaints will be filed with respect to both this decision and the other two pending increases, as soon as the Commission makes its ultimate determinations therein. For the guidance of the federal district courts below in deciding these suits it is respectfully urged that the full Court should reconsider the case at bar and render its decision.

This Matter is Important to the Economic Life of the Nation and Requires Decision by the Full Court

As noted above, since the commencement of this proceeding by the Interstate Commerce Commission in 1968, there have been three subsequent general revenue increase proceedings conducted by that Commission. The first, designated Ex Parte 262, raised rail freight rates on all commodities by 6%. The second, known as Ex Parte 265, raised rail rates on all commodities an additional 6%. A final decision in this matter has not yet been rendered, but in view of subsequent developments, outlined below, it appears highly unlikely that the final decision will order any reduction in this increase. The third, Ex Parte 267, wherein the railroads requested a 15% increase on virtually all commodities, has been decided on an interim basis by the Commission, which has permitted the railroads to raise rates immediately by 8% while it considers the full request of 15%. Thus, within approximately three years the Interstate Commerce Commission has allowed overall freight rate increases of approximately 30% to be imposed on the nation's rail traffic.

Despite the granting of every increase requested by the railroads to virtually the full extent requested, railroad earnings have declined, and the industry appears now to be in a worse position than it was in 1968. These appellants have consistently argued before the Commission that the grants of these across-the-board rate increases were neither adequately supported by the record compiled in the Commission's proceedings nor a satisfactory avenue of assistance to the railroads, since they have resulted in diversion of substantial traffic from the roads.

It is therefore respectfully urged that the Court grant this petition for rehearing in view of the gravity of the issues at bar; and also that Mr. Justice Douglas participate in the consideration and ultimate decision of this case.

Respectfully submitted,

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Dated: December 31, 1970.

Certificate

As Counsel for Appellants, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

JAMES O'MALLEY, JR.